Paul Mueller Company *and* Daniel Lee Gambriel *and* Sheet Metal Workers International Association, Local No. 208. Cases 17–CA–19490, 17–CA–19531, 17–CA–19650, and 17–CA–19752

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On February 23, 1999, Administrative Law Judge Albert A. Metz issued the attached decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the judge's decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

1. The judge dismissed the complaint allegations that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing the pension plan provided for in the collective-bargaining agreement by altering the method by which the pension plan calculated service credits for employees who had a break in employment with the Respondent. The General Counsel excepts and for the reasons set forth below we find that the Respondent violated Section 8(a)(5) by unilaterally changing the contractual pension plan's method for calculating credited service.

The Union has been the collective-bargaining representative of the employees since 1977. The pension plan at issue was negotiated by the parties and included in their 1991-1994 collective-bargaining agreement and in the final offer implemented by the Respondent in 1995. The Respondent concedes that the Union has the right to bargain over the terms of the pension plan. The pension plan is administered by three trustees, who are also high-ranking members of the Respondent's management: Don Golik, Respondent's executive vice-president and chief financial officer; Jerry Miller, Respondent's risk and benefits manager; and Mike Young, Respondent's director of human resources. In May 1998, the Union requested and the Respondent provided the minutes of the two most recent trustees' meetings, which occurred on November 24 and December 23, 1997.

According to the December 23 minutes, the Respondent's management officials as trustees of the plan voted to modify the terms of the pension plan to use the same method of calculating credited service for all present employees, even if they had a prior break in service. Over the years the plan had changed.[2] Prior to the enactment of the Employee Retirement Income Security Act of 1974 (ERISA), employees who had a 1-day break in service lost credit for their prior years of service if they were rehired. The current plan allows for a 5-year break in service without loss of pension credit, which is a requirement of ERISA. However, a number of the Respondent's current employees fell outside of the ERISA requirement. The December 23 change was designed to bring all collective-bargaining unit employees within the 5-year service break rule. It is undisputed that the change in calculating credited service was made without notice to the Union.

The judge found that the trustees, in making the change, were acting not as agents of the Respondent, but as independent fiduciaries, pursuant to their obligation to represent the interest of the pension plan's beneficiaries. Accordingly, the judge did not attribute the change to the Respondent. Consequently, the judge concluded that the General Counsel had failed to demonstrate that the change constituted a failure on the part of the Respondent to bargain, and dismissed the complaint allegations. We disagree.

The Board has long found that pension benefits constitute future wages and are within the meaning of Section 8(d)'s terms and conditions of employment, and are thus, a mandatory subject of bargaining. *Inland Steel Co.*, 77 NLRB 1, enfd. 170 F.2d 247 (7th Cir. 1948), cert. denied 336 U.S. 960 (1949). See *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 159 (1971). The terms of the pension plan at issue were the product of the parties' collective bargaining, and the Respondent concedes that the Union has the right to bargain over the terms and conditions of the underlying trust agreement establishing the pension plan. It is also undisputed that the December 23 modification changed the method of calculating service credit, an existing term of the pension plan that the parties had negotiated.

Although the Board has long recognized that a union can waive statutory rights, the party arguing waiver must show it was clear and unmistakable. *Silver State Dis-*

[1] There were no exceptions either to the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by warning employee Steve Slone or the judge's recommendation that the complaint allegations that the Respondent discriminatorily denied overtime to employee Daniel Lee Gambriel and unilaterally changed the calculation of plant seniority be dismissed.

[2] The record is silent as to how or when these changes were made.

posal Service, 326 NLRB 84 (1988). In this case, there has been no showing that any provision in the negotiated trust agreement privileged the unilateral change.

The Respondent asserts that management officials were acting as trustees, rather than agents of the Respondent, in making the change.[3] However, no evidence was presented as to the nature and extent of the powers given to the trustees by the plan, let alone evidence that they possessed the power to change benefit provisions that the Respondent and Union had negotiated. In most circumstances, there is little doubt that high management officials are acting as agents of the Respondent. There is no reason here to conclude that, in changing the actual terms of the pension plan, Respondent's officials were acting independently of the Respondent, solely in their capacity as trustees, and within the limits of their authority.[4] We are unwilling to rely on the label of "trustee" to assume otherwise. Accordingly, we find that that the Respondent violated Section 8(a)(5) and (1) of the Act by changing the terms of the pension plan.[5]

2. With regard to the trustees' replacement of the pension plan actuary, we agree with the judge that the General Counsel has failed to establish that the replacement of the pension plan's actuary constituted a change in the terms of the plan. The evidence indicates that the role of the actuary is administrative rather than substantive and that the purpose of the change was to save money by using the same actuary to service both the pension plan for unit employees and the pension plan for nonunit employees. Accordingly, we adopt the judge's recommendation that the complaint allegation regarding the change in the pension plan's actuary be dismissed.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Paul Mueller Company, Springfield, Missouri, its officers, agents, successors and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraphs:

"(b) Unilaterally changing the pension plan's service-break rule."

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs:

"(b) On request of the Union, rescind the change in the pension plan's service-break rule."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. August 27, 2001

Wilma B. Liebman, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN HURTGEN, dissenting in part and concurring in part.

I do not agree that the Respondent violated Section 8(a)(5) by virtue of a change in the terms of the pension plan. The pension plan is administered by trustees, and they are the ones who made the change. It is clear that trustees of a plan are *not* the agents of the party who appointed them.[1] Unlike agents of a party, they are not responsible to that party. Rather, their sole responsibility is to the employee-beneficiaries of the plan.[2] Further, it is irrelevant that the persons who are trustees may also

[3] Our dissenting colleague finds support for this claim in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). We disagree. In *Amax*, the Court held that the management-appointed trustee of a Sec. 302 (c)(5) trust fund was not a collective-bargaining representative of the employer for purposes of Sec. 8(b)(1)(B) of the Act. The Court found that once appointed the trustee's fiduciary obligation runs only to the trust's beneficiaries irrespective of who appointed that trustee or under what scheme of representation the trustee was appointed. Contrary to the assertion of the Respondent and our dissenting colleague, *Amax Coal* does not transform all conduct of a trustee into the conduct of a fiduciary. See *NLRB v. Construction & General Laborers' Union Local 1140*, 887 F.2d 868 (8th Cir. 1989) (finding that unlawfulness of union picketing to force payment of delinquent pension contribution not immunized by union officer's status as fund trustee). Further, in *Electrical Workers IBEW Local 412 (Kansas City Power)*, 282 NLRB 1068 (1987), the Board rejected a union's contention that changes sought to pension benefits provided by a trust fund established in accordance with a collective-bargaining agreement were not a mandatory subject of bargaining because the benefits were left to the exclusive control of the fund's trustees.

[4] Contrary to the dissent's suggestion, the fact that the change was effected as a practical matter does not establish that it was legally proper, whether under the Act or under the law that specifically governs the actions of pension plan trustees. Under the Employee Retirement Income Security Act (ERISA), plan trustees are required to administer the plan "in accordance with the documents and instruments governing the plan," which may include a collective-bargaining agreement. 29 U.S.C. Sec. 1104(a)(1)(D).

[5] In finding that the Respondent violated Sec. 8(a)(5) and (1) by voting to change the terms of the pension plan, we note that the lack of any notice to the Union prior to the vote and the passage of 5 months before the Union learned of the change indicates that the change was a *fait accompli*. Under these circumstances, we find that the Union could not be said to have waived, by inaction, any opportunity to bargain over this change. *Bituminous Roadways of Colorado*, 314 NLRB 1010 fn. 2 (1994).

[1] *NLRB v. Amax Coal*, 453 U.S. 322 (1981).

[2] Ibid.

wear another hat. It is not unusual that a trustee of a plan is also an agent of a party. When acting as trustees, that person owes a fiduciary duty to the employee-beneficiaries. When acting as agent, that person owes a fiduciary duty to his principal. In the instant case, the persons took the action in their capacity as trustees.

My colleagues suggest that the trustees lacked the power to make the change. However, there is no evidence that they were acting *ultra vires* or that their change was not effective. Indeed, the General Counsel's case rests on the proposition that the change was effective.

My colleagues suggest that the change may have been unlawful under ERISA. Assuming arguendo that it was, I do not understand how the illegality of trustee conduct coverts the conduct into that of the Respondent.

My colleagues also say that "there is little doubt" that the trustees were acting as agents of Respondent. However, as discussed above, the law is quite the other way. Perhaps, there could be cases where a party directs the trustees to take a certain action. However, if the trustee acts solely because of that directive, and not in consideration of the interests of the beneficiaries, that would be a breach of the fiduciary duty. There is no evidence that this occurred here.

NLRB v. Construction & General Laborers' Union Local 1140, 887 F.2d 868 (8th Cir. 1989), cited by my colleagues, is inapposite. The picketing there was clearly that of the union, protesting the primary's alleged breach of the union's contract. Similarly, *Electrical Workers IBEW Local 412 (Kansas City Power)*, 282 NLRB 1068 (1987), is inapposite. That case held that pension benefits are a mandatory subject. That is not the same thing as saying that trustee actions are those of the employer or union.

On a different matter, I concur that the trustees' replacement of the actuary was not unlawful under Section 8(a)(5). In this regard, I agree that the change was administrative and not substantive. However, for the reasons set forth above, I also rely on the fact that the change was made by the trustees and not by agents of Respondent.

Dated, Washington, D.C. August 27, 2001

Peter J. Hurtgen, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT issue disparate disciplinary warnings to employees because of their union or protected concerted activities.

WE WILL NOT unilaterally change the service-break rule in the pension plan.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL within 14 days from the date of this Order, revoke the written warning issues to employee Steve Slone on or about January 8, 1998.

WE WILL, on request of the Union, rescind the change in the service-break rule.

PAUL MUELLER COMPANY

Richard C. Auslander, Esq., for the General Counsel.
Stanley E. Craven, Esq., for the Respondent.
Michael Krasovec, for the Charging Party Union.

DECISION[1]

ALBERT A. METZ, Administrative Law Judge. This case involves issues of whether the Respondent has violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (Act).[2] On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the parties' briefs, I make the following findings of fact.

I. JURISDICTION AND LABOR ORGANIZATION

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

The Respondent is a manufacturer of steel tanks and maintains a place of business in Springfield, Missouri. The Union

[1] This case was heard at Springfield, Missouri, on December 10, 1998. All dates refer to 1998 unless otherwise stated.
[2] 29 U.S.C. § 158 (a)(1), (3) and (5).

has been the collective-bargaining representative of certain of the Respondent's employees since 1977.[3] The most recent collective-bargaining contract between the parties had a term of June 12, 1991, to June 11, 1994. In 1995 the unit employees went on strike. The Union subsequently filed unfair labor practice charges against the Respondent and in two previous hearings before administrative law judges the Respondent was found to have committed various unfair labor practices.[4]

III. GAMBRIEL'S OVERTIME

Daniel Lee Gambriel is an employee in the plate heat exchanger department (Department 931). The Government alleges that the Respondent discriminated against Gambriel by denying him overtime work during a period beginning in approximately September 1997. The Respondent denies Gambriel was discriminatorily denied overtime.

Gambriel is a union supporter and had prevailed in an earlier unfair labor practice case that alleged he was discriminatorily assigned work when he returned from strike. Gambriel's department contains four work areas where employees are assigned: gasketing, assembly, welding, and painting. Gambriel was assigned to the paint area. He testified he believed overtime had always been assigned based on seniority, skills, and ability. Supervisor Roger Krull testified that overtime was assigned to employees who regularly performed that area's work. The overtime in dispute here involved the gasketing area. Krull credibly explained how that overtime had been assigned to employees working in the gasketing area. He noted that higher skilled (and paid) employees, such as Gambriel, were not required to do the work. Gambriel conceded that he exclusively received overtime when it was assigned for the paint area.

I found Krull to be a credible witness who effectively explained the department overtime practice. Based on the record as a whole I find that there is insufficient evidence that Gambriel was discriminated against in the assignment of overtime because of his union or concerted activities. I shall dismiss this allegation of the complaint.

IV. DISCIPLINARY WARNING TO STEVE SLONE

Respondent's employee Steve Slone is an active union supporter. He went on strike against the Respondent, picketed, was chief union steward and a member of the strike and negotiating committees. Slone was the subject of an unfair labor practice charge discussed in the decision in JD (SF)–04–98. I found in that decision the Respondent had unlawfully discriminated against Slone in assigning him work when he returned from the strike.

On January 8, 1998, Slone received a written warning for being out of his work area without authorization. Slone, 1998, admittedly left his work area on January 8 and went to the shear department to get some shims to set up his machine. He had a conversation with another employee, Jim Hulse, and asked him if anyone was available to get him the shims. Slone was informed that no one was on duty at the time that could get him the shims. He then asked Hulse, who had not yet started work, if he could do a personal project for him in his spare time. They briefly discussed the project and Slone returned to his work area. The record shows that it was common for employees to engage in casual conversation during the working day.

Boyd Craig, Slone's supervisor questioned him about the incident later in the day. Slone admitted being in the shear department and talking to Hulse about the shims and his personal project. Craig told him to make sure he did such things on his own time. That afternoon Slone was called to Supervisor Kenny Craig's office where he again was questioned about his morning conversation with Hulse. Slone repeated his version of what had happened. Craig said that he was going to write Slone up for being out of his work area without permission. Craig said that Slone had been warned before about such matters. This was a reference to a dispute Slone had with another employee some months earlier that had been resolved by management after an investigation. Slone denied that he had ever been warned about being out of his area, including the incident involving the other employee. McGuire said he had documentation of the earlier warning. Slone and his union representative, who was also present, both asked to see the documentation. Slone then challenged McGuire as to why he was being written up when such conversations regularly took place and no one else was so disciplined. McGuire said he wanted to talk to Human Resources Manager Mike Young about the matter and they would talk later about the subject.

The next day the parties again met about the written warning. McGuire said they "had to start some where" regarding such writeups. Slone argued about why he was being the first selected to receive a writeup as such things were not cause for discipline of other employees in the past. McGuire mentioned the earlier warning to Slone. Slone again asked to see the documentation. McGuire did not produce any such documentation. McGuire did not testify at the hearing. Slone subsequently searched his personnel file and found it contained no mention of a warning. Slone filed a grievance concerning his January written warning. During discussions about that grievance the parties rehashed the same points related above. There was no adjustment of the matter as a result of the grievance.

The record supports the conclusion that the warning given to Slone for being out of his work area was unprecedented. He undisputedly was talking about a work matter as well as a personal matter when he went to the shear department. The fact that he was out of his department on his own volition in order to get shims was not extraordinary nor had he ever been disciplined for such a matter in the past. The Respondent did not produce any evidence that Slone had ever received any warnings in the past as alleged by McGuire. The Respondent did not produce any evidence that any employee had ever been disciplined for such a matter either before or after Slone received his written warning. I find that the written warning given to Slone was disparate treatment of him as compared to other employ-

[3] The unit is: All full-time and regular part-time craftsmen, fabricators, and production employees employed by Respondent at its Springfield, Missouri, facility, excluding all executives, managers, professional employees, technical employees, office employees, clerical employees, administrative employees, guards, and supervisors as defined in the Act and employees employed in the machine shop, maintenance areas and other machinist work areas.

[4] JD–60–97 and JD (SF)–04–98. These cases are presently pending appeal before the Board.

ees. I conclude that this discriminatory treatment was motivated by his union activities and, as such, is a violation of Section 8(a)(1) and (3) of the Act. *Quality Packaging*, 265 NLRB 1141, 1147–1148 (1982).

V. ALLEGED UNILATERAL CHANGES

A. Definition and Calculation of Seniority

The Respondent and the Union agree that seniority at the plant for union represented employees is defined as of the latest uninterrupted period of regular employment with the Respondent. The Government alleges that during a grievance meeting in March 1998 the Respondent unilaterally changed that definition. The Respondent denies changing the definition of seniority.

The grievance was filed in July 1997 by John Childers who was objecting to being moved from the first to the second shift. He alleged that three individuals on his shift had less seniority and should have received the transfer. The contract clause covering the subject of shift assignments states:

> Section 5. In all cases of . . . assignment of shifts . . . the following factors shall be considered:
>
> A. Seniority;
> B. Skills required to perform the work;
> C. Ability, as it relates to work performance, productivity, scrap and rework, and;
> D. Dependability, as it relates to absenteeism for reasons other than disability or work-related injury.
>
> Seniority shall govern when it is determined that B, C and D are substantially equal based on the Company's sole and exclusive judgment.
>
> The principle of giving preference to the most senior employees shall prevail, after applying the above considerations.

There is no dispute that the three other employees involved in the grievance had less seniority than Childers. One, Tim Carpenter, was a newer employee that the Respondent wanted to keep on the first shift under close supervision to complete his training period. The other two, Kenneth Lee and Randy Vaughn, were employees of longstanding experience with the Respondent. They, however, each had a break in employment with the Respondent that under the contract gave them less seniority than Childers.

In March 1998 a joint Respondent-Union meeting was held on Childers' grievance. Childers presented his case and pointed out that he believed he shared equal ability and skill with the other individuals involved and that he had more seniority. According to union representative, Mike Krasovec, the Respondent's director of human resources, Mike Young, responded that because of the other two employees' skills, abilities, seniority, and previous employment with Respondent, they deserved to stay on first shift. Krasovec questioned whether Young was adding their various periods of working for the Company and giving them more seniority than Childers. According, to the Union's witnesses Young said that they had more "tenure" because of their longer service with the Respondent.

Krasovec conceded that Young said that though the seniority dates of Lee and Vaughn are less than Childers, their overall tenure and experience with the Company must be looked at when considering skills and ability. Krasovec also acknowledged that Lee and Vaughn had more tenure with the Respondent. Young testified that the Respondent looked at Lee and Vaughn's skills, abilities, and their tenure with the Company, which was a plus for their experience levels. In the end the Respondent assessed Lee and Vaughn's skills and abilities as superior to those possessed by Childers.

There were disparate recollections of exactly what was said and meant regarding the definition of seniority in the Childers' grievance meeting. The union representatives understood that the Respondent was changing the way seniority was calculated, i.e., segmented parts of employment were being added together to increase seniority. Both Krasovec and Union President Jim Hulse recalled Young referred to this consideration as "tenure" and not seniority. Young credibly testified that he was explaining that shift assignments were made by giving consideration to past experience, no matter when achieved, including previous employment with the Company. Respondent concedes that Childers had more seniority but that the other men had more experience and this was a consideration in making the decision. I find the record as a whole does not establish that the Respondent unilaterally changed the calculation or definition of seniority as alleged in the complaint. I shall, therefore, dismiss these allegations of the complaint.

B. Trustees' Changes Regarding the Pension Plan

The Government alleges that trustees administering the Union's pension plan unilaterally voted to make certain changes regarding the plan and the Respondent thereby violated the Act. The Respondent's defense is that the pension plan trustees act as fiduciaries and do not have to bargain with the Union about such changes.

The union employees are covered by a pension plan that is administered by three trustees. These trustees are members of Respondent's management: Mike Young, director of human resources, Don Golik, executive vice president and chief financial officer, and Jerry Miller, risk and benefits manager. The board of trustees meets periodically and, on request, the Union is sent the minutes of such meetings. In May 1998 the Union asked for and received the minutes from various trustee meetings. The Union discovered that at the meeting of November 24, 1997, the trustees had voted to change the pension fund actuary.

The minutes also revealed that on December 23, 1997, the trustees voted to change the method by which the pension plan calculated service credits for employees who had a break in employment with the Respondent. Over the years the plan had changed and historically employees that had a 1-day break in service lost credit for their prior years service if they were rehired. The current plan allows for a 5-year period break in service. Thus, if a worker quits employment with the Respondent and is subsequently rehired within 5 years, his prior years of service will be credited toward his pension. This standard is a requirement of ERISA. There were a number of current employees who fell outside the ERISA requirement. The trustees,

therefore, voted at the December meeting to allow all employees to be covered by the more generous ERISA requirement. Although the change had been approved at the time of the trial in this case the plan had not been amended to conform to the change. The Union admitted that it had not asked for an explanation of the change before filing the unfair labor practice charge concerning this matter.

At common law trustees have the obligation to represent the interests of the beneficiaries. *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981); *Garland-Sherman Masonry,* 305 NLRB 511 (1991); *Commercial Property Services*, 304 NLRB 134 (1991)(when an individual acts in his capacity as trustee his obligations are fiduciary in nature and he is expected to safeguard the trust for the benefit of the beneficiaries. Thus, an individual who acts in the capacity of a trustee functions as the spokesperson of the beneficiaries, not the appointing party.); *Food & Commercial Workers Local 1439 (Layman's Market)*, 268 NLRB 780, 781 (1984).[5] While the trustees of the union pension plan are all management employees they have separate and distinct obligations as trustees of that plan. The change of actuaries was made to lessen administrative expenses. The change of service credits was made to benefit employees with less stringent requirements. There is no evidence that such actions were inconsistent with the best interests of the beneficiaries. Additionally, there is no evidence that the Respondent directed the decisions, had any control over them, or that the administrators acted in any capacity other than trustees. As the Board has noted in *Commercial Property Services*, supra at 134:

We are not suggesting that an individual who serves as a trustee always acts in his capacity as trustee, and therefore can never serve as an agent for the union or the employer. See, e.g., *Service Employees Local 1-J (Shor Co.)*, 273 NLRB 929 (1984), see also *Griffith Co. v. NLRB*, 660 F.2d 406, 411 (9th Cir. 1981), cert. denied 457 U.S. 1105 (1982). We simply proceed from the premise that a trustee is not acting for the union or the employer unless contrary evidence shows otherwise.

I find that the Government has failed to prove by a preponderance of the evidence that when the trustees voted to change actuarial agents and service credits that the Respondent thereby violated Section 8(a)(1) and (5) of the Act. I therefore shall dismiss these allegations of the complaint.

CONCLUSIONS OF LAW

1. Paul Mueller Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Sheet Metal Workers International Association, Local 208, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) and (3) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act except as herein specified.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Paul Mueller Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing disparate disciplinary warnings to employees because of their union or protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, revoke the written warning issued to employee Steve Slone on or about January 8, 1998.

(b) Within 14 days after service by the Region, post at its facility in Springfield, Missouri, copies of the attached notice marked "Appendix." [7] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 8, 1998. *Excel Corp.*, 325 NLRB No. 14 (November 7, 1997).

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated: February 23, 1999

[5] The Board cases typically address trusts involving equal representation by trustees from management and labor pursuant to the statutes.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT issue disparate disciplinary warnings to employees because of their union or protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, revoke the written warning issued to employee Steve Slone on or about January 8, 1998.

PAUL MUELLER COMPANY